

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement (the Agreement) between **Fraternal Order of Police, Lodge #5** (referred to herein as the FOP or the Union) and **The City of Philadelphia** (the Department, the City or the Employer). The Union filed a timely grievance challenging the September 2, 2013 dismissal of Police Officer Andre Boyer (referred to herein as Grievant). The parties were unsuccessful in resolving the grievance through their grievance procedure and the Union thereafter filed a timely demand for arbitration. The parties selected the undersigned as arbitrator through the processes of the American Arbitration Association (AAA) to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on May 23 and June 26, 2014 in Philadelphia, Pennsylvania. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire hearing and testified on his own behalf. A transcript of the hearing was made. Following the hearing the parties elected to present oral post-hearing closing argument, upon the receipt of which by the Arbitrator the dispute was deemed submitted at the close of business June 26, 2014.

This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

ISSUES

The parties stipulated that there are no procedural bars to the presentation of the matter; that the matter is appropriately before the arbitrator; that the arbitrator has the

authority to render a final and binding decision and award in the matter and that the issue or issues presented may accurately be stated as:

Did the City of Philadelphia have just cause to terminate Police Officer Andre Boyer and, if not, what shall be the remedy?

FACTS

Introduction

Prior to his termination Grievant had been a police officer with the City for approximately seventeen years. Grievant was served with a Notice of Dismissal Effective September 2, 2013. The Notice identified the following four reasons for the termination, providing:

CONDUCT UNBECOMING, SECTION 1.S009-10 (lying or attempting to deceive regarding a material fact during the course of any Department investigation.)

In that on May 17, 2012 you were interviewed in reference to an investigation into an arrest that occurred on Tuesday, September 6, 2011 approximately 9:30 PM, in the area of the 2300 block of N. 10th Street. The investigation determined that you lied during the interview.

CONDUCT UNBECOMING, SECTION 1.S011-10 (abuse of authority.)

In that on Tuesday, September 6, 2011, approximately 9:30 PM, you and your partner, Officer A [REDACTED] O [REDACTED] # [REDACTED], conducted a vehicle investigation in the area of the 2300 block of N. 10th Street. The operator, M [REDACTED] H [REDACTED], was arrested for narcotics violations after a search of the vehicle revealed one brown colored cigar blunt (alleged marijuana) in the ashtray and a search of her purse produced more alleged marijuana. You conducted an investigation on the passenger, W [REDACTED] G [REDACTED], Mr. G [REDACTED] had a large amount of money on his person but had proof that he had withdrawn money from the bank earlier, as well as documentation of a large monetary settlement from a

lawsuit. An NCIC/PCIC check for Mr. G [REDACTED] would prove negative. You did not have the requisite legal reason (reasonable suspicion or probable cause) for confiscating Mr. G [REDACTED]'s money and transporting him to the district for further investigation.

DISOBEDIENCE, SECTION 6-S006-10 (Failure to follow Departmental procedures for the handling of evidence, personal effects, and all other property taken into custody except narcotics, money, explosives, firearms, hazardous materials or forensic evidence.)

In that on Tuesday, September 6, 2011, approximately 9:30 PM, you arrested M [REDACTED] H [REDACTED] for narcotics violations in the area of the 2300 block of N. 10th Street after she was stopped for a vehicle investigation. W [REDACTED] G [REDACTED], a passenger in the vehicle, was transported to headquarters for investigation. A search of the trunk of the vehicle uncovered a scale and white powder in a Ziplock bag. These items were not confiscated and placed on property receipts.

DISOBEDIENCE, SECTION 6-S007-10 (Failure to follow Departmental procedures for the handling of narcotics, money, explosives, firearms, hazardous materials or forensic evidence.)

In that on Tuesday, September 6, 2011, approximately 9:30 PM, your arrested M [REDACTED] H [REDACTED] for narcotics violations in the area of the 2300 block of N. 10th Street after she was stopped for a vehicle investigation. The passenger, W [REDACTED] G [REDACTED], had a large amount of money confiscated from his pocket and was transported to headquarters for investigation. You failed to follow departmental policy, according to Directive 91, regarding currency confiscation. Directive 91, Property Taken into Custody, Section 7–8, Cash Intake Procedures, states, in part, “When currency is confiscated, the confiscating officer and his/her immediate supervisor will ensure when practical that the currency is counted at the scene of the confiscation and when possible in the presence of the person who is surrendering the currency and then transported to the pertinent division headquarters.” You neglected to notify your immediate supervisor at the scene or any time while you were investigating the money.

The Notice of Dismissal goes on to provide:

By your actions, you have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a thirty day suspension.

On 8/6/13 in the presence of Captain Charles Green #81, Internal Affairs Division, Captain R [REDACTED] L [REDACTED] # [REDACTED], 22nd District, Sergeant Brad Lukach #350, Internal Affairs Division, Gerald Stanshine, Attorney, Fraternal Order of Police and Michael Trask, Representative, Fraternal Order of Police you were given your Non-Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to dismiss

Events of Tuesday, September 6, 2011

It is undisputed that while on patrol at approximately 9:30 PM on September 6, 2011 Grievant and his partner that evening, Officer A [REDACTED] O [REDACTED], stopped a blue Ford driven by M [REDACTED] H [REDACTED] after the automobile stopped in a crosswalk and failed to signal a left turn, and that W [REDACTED] G [REDACTED] was in the front passenger seat of the automobile. This matter presents significant issues relating to the credibility of the various witnesses and their descriptions of the events during and after the September 6, 2011 traffic stop. In support of its case the City offered the testimony of Officer O [REDACTED], passenger W [REDACTED] G [REDACTED], Forfeiture Unit Detective L [REDACTED] F [REDACTED], Canine Unit Officer J [REDACTED] S [REDACTED], Sergeant L [REDACTED] T [REDACTED], Internal Affairs Captain Michael Craighead, Police Commissioner Charles Ramsey, and Captain Gregory Malkowski.

Officer O [REDACTED] testified that both Grievant and he have completed special training in narcotics interdiction. In addition, Grievant has N.E.T.S. training on field testing of substances to determine whether they are narcotics. O [REDACTED] is not N.E.T.S. trained. According to O [REDACTED], he recalled that when he and Grievant made the traffic stop both Grievant and he went to the driver's side of the stopped vehicle and that as he approached the vehicle he detected the smell of marijuana. According to O [REDACTED], Grievant made contact

with the driver and asked her for license, registration and proof of insurance and that when Grievant went back to the patrol car to run checks on the driver O ■ walked around to the passenger side and began to engage W ■ G ■ in conversation. O ■ recalled that when he looked into the vehicle from the passenger side he observed a “blunt” in plain sight in the ashtray and that G ■ had a large bulge in his pocket. O ■ asked G ■ if the bulge was a weapon and G ■ responded that it was not, that it was money. O ■ testified that at that point G ■ explained that he had just received a check that day as a result of a lawsuit resulting from his leg being injured when he was hit by a truck, that he had deposited the check in his bank, that he had withdrawn a large amount of cash and that he had documents with him to show such. O ■ also testified that he read the documents offered by G ■ and that the documents supported G ■’s story, but that he doesn’t recall if he read the documents at the time of the traffic stop or later after the driver and passenger were transported to the police station.

In any event, O ■ continued, the officers asked for and received permission to search the vehicle. At that point G ■ was told to step out of the car and O ■ patted him down, during which the officer confirmed that the bulge in G ■’s pocket was an envelope containing cash. O ■ recalled that during the search of the automobile – a primary search conducted by O ■ and a secondary search conducted by Grievant – he found a marijuana blunt in the passenger compartment and that when he searched the vehicle’s trunk O ■ discovered a small electronic scale and a six inch by six inch Ziplock bag containing a white powder. According to O ■, he looked into the car’s glove compartment and found nothing there. O ■ testified that he showed the scale and bag of powder to Grievant and that the items were placed in the patrol car trunk. The

driver of the vehicle was then arrested for a narcotics violation relating to the marijuana recovered from the automobile.

As for the white powder, O ■ testified that he asked both the driver and passenger what it was and was told the powder was laundry detergent. O ■ testified that he smelled the powder and that it did not smell like laundry detergent and that he suspected that it was cocaine.

According to O ■, Grievant first saw G ■'s money after they completed the search of the vehicle and that O ■ told Grievant about the passenger's statements about how he came to have the cash he was carrying, and that after the scale and powder were discovered, Grievant wanted to investigate the matter further, to proceed with a drug investigation. O ■ testified that he disagreed with Grievant and that he believed G ■'s story about the origin of his money. In this regard, O ■ testified, based upon his training and experience he found G ■'s explanation about the money to be believable; it was not one of the usual stories given under the circumstances, G ■ showed him his leg prosthetic and he believed G ■. According to O ■, notwithstanding his own position that G ■ should not be subject to further investigation, Grievant decided that the money should be confiscated. He doesn't recall which officer took the money from G ■, but O ■ testified that the cash was placed in the patrol car's trunk with the other confiscated items. According to O ■, Grievant cuffed G ■ and informed the passenger that he was going to be taken to the station for purposes of further investigation.

Both the driver and passenger were then transported to the District and according to O ■, he observed Grievant remove the scale, blunt, powder and money from the

patrol car trunk and take the items downstairs toward the N.E.T.S. room; he saw the items in Grievant's hands as Grievant stated he was going downstairs to N.E.T.S. O ■■■ stayed with the driver and passenger upstairs while Grievant ran tests on the items. During that time G ■■■ showed O ■■■ the documents relating to the money, including the copy of an attorney letter releasing the settlement money and a receipt for a withdrawal of money from a bank; documents O ■■■ concluded supported the passenger's statements about the money. When Grievant returned from downstairs O ■■■ told him about the money related documents presented by G ■■■. Grievant stated that the testing of the powder was inconclusive but that the test for marijuana had been positive. Grievant then told O ■■■ that he was going to call in a canine on the money to support the forfeiture of the money. O ■■■ responded by telling Grievant that the money was in the car, that they smelled marijuana in the car and that, of course, the dog would "hit" on the money. O ■■■ then told Grievant again about G ■■■'s documentation explaining the money and stated that he disagreed that the money could be taken, that he believed G ■■■'s story about the money and that he disagreed that calling in a canine was appropriate. When Grievant said he was going forward with the canine, O ■■■ told Grievant not to put his (O ■■■) name on the forfeiture of the money.

According to O ■■■, because Grievant is N.E.T.S. trained and was going to test the items, the chain of custody went to Grievant and Grievant was responsible to report and receipt the items. O ■■■ also testified that aside from the question of G ■■■'s money, each of the items - the marijuana, scale and powder – should have been put on a receipt. O ■■■ testified that he left the District about an hour and fifteen minutes prior to the end of his shift and that he never saw any of the items again.

According to G ■■■■■, both officers initially came to the passenger side of the vehicle and that Grievant searched the car and found a manila envelope with cash in the glove compartment and found a bag of baking soda for use on battery acid in the car. According to G ■■■■■, he told the officers that he had six thousand dollars in cash in the envelope in the glove compartment and that O ■■■■■ asked him how he got the money. He then told the officers, both Grievant and O ■■■■■, about his lawsuit and receiving the money and that he had documents for the money. According to G ■■■■■, O ■■■■■ then read the documents and told Grievant that G ■■■■■ was telling the truth. Grievant then cuffed G ■■■■■ and took them to the station.

G ■■■■■ testified that Grievant located the powder in the car and that when he did so he held up the plastic bag and got all hyped and yelled "got it!" According to G ■■■■■, Grievant then got all demanding and put his hand on his gun and told them not to move.

At the station G ■■■■■ and H ■■■■■ were told to sit on a bench. G ■■■■■ asked if they were under arrest and, according to G ■■■■■, Grievant said no, that he was going to run a field test and if the powder was baking soda they would be able to leave. According to G ■■■■■ he was at the station for two or three hours and that eventually Grievant told him there was a dog coming to see if he would hit on the money and that later the dog made a hit on the money. G ■■■■■ asserted that he was eventually presented a receipt for \$3,200, some \$3,000 less than he had when he was originally stopped by Grievant. He asserted that he was cheated out of his money and that when he was released both Grievant and O ■■■■■ walked him to H ■■■■■'s car. According to G ■■■■■, there was no scale in the car. G ■■■■■ admitted that he had prior drug convictions when he was younger, but added that he had paid for his mistakes.

Lieutenant L ■ F ■ of the Department's Narcotics Forfeiture Unit testified that his Unit will seize assets, especially currency, of drug dealers. He explained that when he receives a call from an officer seeking to implement a currency forfeiture, his practice is to have the officer give him a summary of the circumstances. F ■ will ask if narcotics are involved; if the individual involved has employment and if there are any records or documents to establish proof of ownership of the currency. F ■ testified that he had previous experiences with Grievant and forfeitures – more than some officers. In the instant case, F ■ recalled that in the evening of September 6, 2011 Grievant telephoned him and said they had made a traffic stop and the male had a little over \$3,000 in cash. According to F ■, Grievant called pursuant to the Department's practice and requested that F ■ come to the 22nd District and do a forfeiture of the currency. F ■ questioned the circumstances involved; whether there were narcotics present, whether there had been an arrest for narcotics, and whether the individual said anything about the source of the money – whether there was proof or documentation as to where the money came from, and to describe the money – was the money bundled and in what denominations. According to F ■, Grievant advised that the male could not provide a source for the money; that there was no documentation for the money and that the money was in “small denominations” – what F ■ takes to mean ones, fives, tens and twenties. F ■ testified that he does not consider One Hundred Dollar bills to be small denominations as they are the largest there are.¹ He explained that based upon his training, small denominations are considered to be more likely the product of narcotics traffic. F ■ does not recall whether

¹ The receipt given G ■ by Grievant identifies the currency confiscated from G ■ as two (2) twenty dollar bills, four (4) fifty dollar bills and thirty four (34) one hundred dollar bills.

or not Grievant stated that G ■■■ was unemployed and testified that the first he learned of a scale being present was when he reviewed a property receipt the following day.

F ■■■ advised Grievant that he could not come over and do a forfeiture on the money that evening (only the second time F ■■■ has not been able to personally do such) and instructed Grievant to have a dog do a sniff and if the dog gave a reaction to property receipt the money, place it in the safe and F ■■■ would do a forfeiture on it the following day.

F ■■■ testified that if documentation as to the origin of the money was recent, within a couple of weeks to month, he would probably not advise taking the money.

As for Appendix C of Police Directive 9, F ■■■ testified that the language therein providing that two or more of the listed probable cause factors might exist in order to seize assets for forfeiture, does not present a determinative checklist that will automatically justify seizure. Rather, even when such factors are present, F ■■■ explained, the totality of the circumstances should be taken into consideration. Even if two factors are present but the individual has timely proof that the money belongs to him, F ■■■ opined, they would not forfeiture the money.

K-9 Officer J ■■■ S ■■■ recalled being called to the 22nd District on September 6, 2011. He recalled that he was told that marijuana and a scale had been recovered from a vehicle. He was there to do a forfeiture search with his dog for Greivant. He did the search and the dog hit on the money. He testified that it is “definitely more likely” that a dog will hit on money that has been in an automobile with marijuana present than if it had not been in such an automobile. S ■■■ recalled that after he had completed the

search, he walked out into the hallway and a black male asked if he could ask S [REDACTED] a question. According to S [REDACTED]:

He said, "I have a question for you." I said, "What's that?" He said, "I was just awarded a large sum of money from the City for a settlement that I had" and I forget what he told me, how much it was and I said, "How did you get that?" He told me a story how he was hit by a Fed-Ex truck because there was no stop sign. "I just opened an account today and I withdrew money from my account" and that's the money he has. And she showed me a check, or a photocopy of the check and I told him, I'm just here for the search. You have to take that up with the officer who is handling this. He said, "Okay" and that was that. I got my information and I left.

Sergeant L [REDACTED] T [REDACTED] was Grievant's immediate supervisor in the 22nd District on September 6, 2011. He testified that he was not informed of the investigation at the time of Grievant's investigation. T [REDACTED] testified that it is Department policy –Directive 91 - that whenever a thousand dollars or more is going to be confiscated from an individual a supervisor should be present at the time of confiscation and when a property receipt is given. If the confiscation takes place "on the street" any supervisor may be called to the scene. If it takes place at the District the officer is to have any supervisor who is in the building present for the confiscation. According to the sergeant, such is for purposes of checks and balances. When an individual refuses to sign a receipt, T [REDACTED] testified, the officer is supposed to write the word "refuse" in the signature space and the attending supervisor is supposed to sign as the witness.

According to T [REDACTED], if an officer is going to physically take money of over \$1,000 from an individual on the street, the officer is supposed to have a supervisor

present. Instead of taking money on the scene, an officer may allow the money to stay in the individual's pocket during transport to the District, and once at the District the officer may take the money once a supervisor is present. T [REDACTED] also explained that officers cannot just grab a property receipt from a pile. Instead the forms have to be requested from the Operations Room Supervisor (ORS). However, T [REDACTED] testified, the ORS does not function as the supervisor for purposes of forfeitures.

The Investigation

G [REDACTED]'s attorney filed an October 5, 2011 complaint with the Department's Internal Affairs Division asserting that G [REDACTED]'s money had been improperly seized and stolen. The complaint provides in relevant part:

...states Mr. G [REDACTED] is missing property after being stopped by Officer Boyer and Officer O [REDACTED], 22nd District. According to the complainant, on 9-6-11, at 9:45 PM, while driving at 17th Street and Montgomery Avenue, his client was stopped by police. The Complainant stated Mr. G [REDACTED] previously received a large amount of money in settlement, from which he kept \$6,714.71, in cash, for himself. The complainant states officer O [REDACTED] searched Mr. G [REDACTED] and his companion, he found the bank envelope with the money in the glove compartment. Upon showing Officer O [REDACTED] the bank receipt he returned the money to Mr. G [REDACTED]. The Complainant stated officer Boyer then searched the vehicle, where he found a small amount of marijuana and baking powder. The officers handcuffed Mr. G [REDACTED] and his companion, and they were both transported to the 22nd District for processing. The complainant states Officer Boyer told Mr. G [REDACTED] that a K-9 dog had hit on the money. Officer Boyer confiscated \$6,640.71 USC from Mr. G [REDACTED] and offered to return \$3,000 to him. Mr. G [REDACTED] rejected the offer stating he wanted all his money back.

Following receipt of G [REDACTED]'s complaint, Captain Michael Craighead of Internal Affairs conducted an investigation into the matter, an investigation that included interviews of the two civilians involved, numerous police officers including Grievant, O [REDACTED] and S [REDACTED], and other personnel and review of involved documents and relevant Directives. During his investigatory interview with Craighead, when asked about the bag of white powder recovered from H [REDACTED]'s automobile Grievant responded: "I don't know anything about a white powder."

Craighead eventually issued a report to the Police Commissioner including findings that Grievant had violated Department policy by failure to call a supervisor to the site of the vehicle stop, failing to receipt the scale found in the vehicle and failing to receipt the bag of white powder found in the vehicle; by being untruthful regarding the disposition of the white powder, by transporting G [REDACTED] to the District without having probable cause and by confiscating G [REDACTED] currency without probable cause. Craighead explained that he concluded Grievant had lied about the white powder because three of the four witnesses who would have known about the powder testified that it existed and yet Grievant claimed he didn't know anything about a white powder. As for lack of probable cause to take G [REDACTED] money, Craighead explained, the only thing Grievant had to really go on was the dog hitting on the money. In this regard, Craighead continued, G [REDACTED] asserted that he showed Grievant the documentation establishing the source of the money and there was no evidence, other than the dog, to connect the source of the money to the marijuana discovered in the automobile; evidence required to support confiscating the money.

Grievant was served with charges on February 6, 2013 and a PBI was conducted on July 23, 2013 resulting in a finding that Grievant was guilty of the charges. The findings of the PBI were approved by upper command and eventually by the Police Commissioner, who testified that he reviewed the Internal Affairs report and related documents and agreed with the PBI that because of the very serious nature of the charges found by the Board to have merit, dismissal was warranted.

Testimony of Grievant

Grievant testified that he has had drug interdiction training and is N.E.T.S. (Narcotics Enforcement Team) certified, but that although he knows how to field test for narcotics other than marijuana, according to Department Policy he may only test for marijuana. If other drugs are suspected, Policy requires that they be transported directly to the Detectives for testing.

Grievant testified that on September 6, 2011 he and O [REDACTED] approached the blue Ford on the passenger side, that he gathered the necessary information from the driver and G [REDACTED] and that he went back to the patrol car to run the NCIC checks while O [REDACTED] stayed with the two civilians. Grievant explained that the NCIC checks came back with no issues and that because of the odor of marijuana he presented H [REDACTED] with a consent-to-search form and asked her to get out and walk to the back of the car. According to Grievant, H [REDACTED] stated that there were no narcotics or weapons in the car and signed the search consent. With that, Grievant testified, he and H [REDACTED] walked to the sidewalk, O [REDACTED] instructed G [REDACTED] to go stand with Grievant and O [REDACTED] conducted the search of the car. According to Grievant, O [REDACTED] discovered the blunt during the car search and later, on the scene or more likely at the District, discovered two packets of marijuana

in H [REDACTED]'s purse. In any event, Grievant explained, While G [REDACTED] walked to the sidewalk, Grievant observed a bulge in G [REDACTED]'s pocket and asked G [REDACTED] what it was. G [REDACTED] replied that it was money and Grievant asked G [REDACTED] if he worked. According to Grievant after G [REDACTED] responded that he did not work, Grievant asked him two more questions about how he came to have the money and that although he cannot recall the questions asked or answers given by G [REDACTED], he does recall that he determined the answers were inconsistent; they amounted to G [REDACTED] giving him two different stories about the money. Grievant denied that G [REDACTED] told him about a lawsuit or offered to show him documents related to the money or showed him such documents.

According to Grievant because the stop occurred in a known drug area; there were narcotics recovered from the car; G [REDACTED] had a substantial amount of cash and G [REDACTED] could not explain how he came to have the money, Grievant determined he should take G [REDACTED] to the District for further investigation. Grievant informed G [REDACTED] that he was not under arrest, that he was taking him to the District for further investigation. Grievant then handcuffed G [REDACTED].

According to Grievant, after he handcuffed G [REDACTED] he returned to secure H [REDACTED]'s vehicle and that while he was doing so he observed a small silver scale in the backseat of the vehicle. He testified that he left the scale in the vehicle. He further testified that he neither observed any bag full of white powder at the scene nor was told by O [REDACTED] of any such thing. He admitted that he was the one who made the decision to bring G [REDACTED] back to the District and explained that he did so because he felt he did not have enough evidence at the scene to justify confiscation of the money, but that he had sufficient reason to take G [REDACTED] in for further investigation.

When they arrived at the District, Grievant went to the Operations Room to obtain a receipt for the marijuana and the telephone number for the Forfeiture Unit. Before he called Lieutenant F ■■■ he pulled up G ■■■'s history and learned that G ■■■ had a history of manufacturing and distributing narcotics. When he called F ■■■ he was told that F ■■■ could not travel to the District and, according to Grievant, F ■■■ told him what to do; to call the Canine Unit for a search. Once the dog hit on the money, Grievant testified, he felt he had sufficient cause to confiscate the money.

Grievant testified that to support the forfeiture, he relied upon (1) the stop was in a known drug area, (2) the money was located near the narcotics found, (3) G ■■■ had a history of narcotics manufacture and sale, (4) G ■■■ did not have a job; and (5) the dog hit on the money. At no time, Grievant asserted, did G ■■■ tell him anything about a lawsuit settlement or getting money from a lawsuit or that he had documents to show where the money came from. Similarly, Grievant testified, O ■■■ never showed him any documents to explain the money.

According to Grievant, he gave G ■■■ a receipt for the money and placed the confiscated money in the District safe. He testified that he never observed any white powder that evening, that he felt he did not need to confiscate the scale because the scale had no residue on it and it is not illegal to have a scale. He admitted that he did mention the scale on the property receipt relating to G ■■■'s currency. He explained that he did not make his supervisor aware of the money while he was on the scene of the traffic stop because he was not confiscating the money at the scene.

POSITIONS OF THE PARTIES

The Employer

This is a credibility case, the City argues, and to sustain the grievance the arbitrator would have to find Grievant credible. That cannot be done on this record. As to the existence of the white powder, the City asserted, to credit Grievant the arbitrator would have to find that both G [REDACTED] and Officer O [REDACTED] independently fabricated their stories about the existence of the powder. Moreover, O [REDACTED] was credible and specific about the powder. He testified that a six-inch by six-inch plastic bag of powder was found in H [REDACTED]'s trunk; that Grievant said he was going to field test the powder; that he saw Grievant taking the powder, scale and marijuana to the NETs room; and that Grievant reported back to him that the powder had tested inconclusive but that the marijuana had come back positive. Similarly, O [REDACTED] said Grievant had the scale and Officer S [REDACTED] confirmed that he had been told a scale was recovered that evening. The City had ample basis for concluding Grievant lied.

Additionally, the City asserted, the evidence establishes that Grievant abused G [REDACTED]'s rights by confiscating his money without probable cause. The evidence establishes that G [REDACTED] told anyone and everyone his story about money from a lawsuit and having documents relating to the source of the money including a receipt for the cash. He showed the documents to O [REDACTED] and to K-9 Officer S [REDACTED] and it is incredible to think that he did not also do so to Grievant.

Grievant's conduct on September 6, 2011 was deceitful the City argued. Grievant is an experienced officer who knows the rules and knew exactly what to say and do to get what he wanted done. The officer failed to comply with the rules, abused his authority and his conduct should not be condoned, the City concluded.

The Union

Like the City, the Union argues this is a credibility case. But as a credibility case the matter presents more than a narrow question of who the arbitrator believes. Rather, the case presents testimony from a number of different witnesses that should be weighed and judged within the context of consistency. The City simply does not have the right to "cherry pick" only certain parts of the conflicting testimony of different witnesses merely because it suits the City's case to do so, and then broadly discredit the testimony of Grievant because it conflicts with various portions of the testimony of various of the City's witnesses, the Union urged. Here, the Union argued, the City has the burden of proving the technical violations of policy alleged as well as its claim that Grievant was not telling the truth about the events of September 6, 2011. To meet its burden of showing that Grievant is a liar, the City simply cannot rely upon testimony that is inconsistent from that offered by other of the City's witnesses. In this regard, the Union continued, the City presented two witnesses who were present at the vehicle stop; G [REDACTED] and O [REDACTED], and failed to call H [REDACTED]. Although it is true that Grievant presented testimony in conflict to that offered by G [REDACTED] and O [REDACTED], the Union argued, the City has wholly ignored the fact that so too are G [REDACTED] and O [REDACTED] in conflict with one another. The fact is, the Union asserted, the testimony of G [REDACTED] and O [REDACTED] is so irreconcilable as

to create a vacuum of credible evidence that can only be filled by the Grievant. In this regard, the Union continued, inconsistencies between the testimony of G [REDACTED] and O [REDACTED] include:

1. O [REDACTED] testified that G [REDACTED] was seated with a bulge in his right pocket and O [REDACTED] patted G [REDACTED] down by reaching through the passenger side window, took the money out of G [REDACTED]'s pocket and handed it back to G [REDACTED].
2. G [REDACTED] testified that he told O [REDACTED] that he had about \$600 in his pocket but there were thousands of dollars in an envelope with other documents in the glove compartment.
3. O [REDACTED] testified there was nothing in the glove compartment.
4. O [REDACTED] testified G [REDACTED]'s documents were folded up in G [REDACTED]'s pocket.
5. G [REDACTED] testified O [REDACTED] opened the glove compartment, grabbed the envelope and that both officers saw the money and papers.
6. G [REDACTED] testified that Grievant searched the car.
7. O [REDACTED] testified that he searched the car.
8. G [REDACTED] claimed that Grievant searched the trunk and got excited and yelled "got it got it," came over to those on the sidewalk with a bag and hand on his gun.
9. O [REDACTED] testified he found white powder and a scale in the trunk of the car.
10. O [REDACTED] testified that H [REDACTED] stated the powder was laundry detergent.
11. G [REDACTED] testified H [REDACTED] said the powder was baking soda.
12. O [REDACTED] testified that other officers arrived on the scene and transported H [REDACTED] and G [REDACTED] separately to the District.

13. G [REDACTED] testified that O [REDACTED] and Grievant transported H [REDACTED] and G [REDACTED] to the District.
14. G [REDACTED] testified that once at the District Grievant slapped down the envelope with the money, took G [REDACTED] to a room for a strip search and used the \$600 for the dog.
15. O [REDACTED] doesn't support that G [REDACTED] was taken to a separate room.
16. O [REDACTED] testified that he left early and was not present when G [REDACTED]'s money was counted.
17. G [REDACTED] testified O [REDACTED] was present when the money was counted and a receipt was offered G [REDACTED].
18. G [REDACTED] testified that O [REDACTED] was present when G [REDACTED] eventually left the District.

Under such circumstances, where the City's principal witnesses fail to agree on so many facts, the Union asserted, it really doesn't matter what Grievant testified because in determining credibility the arbitrator should never get to him. In this regard, the Union continued, as reflected in the above list of contradictions between the witnesses, the City failed to offer credible witnesses – failed to present credible evidence – about the events of September 6, 2011.

Additionally, the Union argued, the testimony of Lieutenant F [REDACTED] establishes that Grievant did not have the intent to deceive claimed by the City. Thus, F [REDACTED] testified that Grievant telephoned him for purposes of having the Lieutenant come to the 22nd District to complete the forfeiture. There is no way, the Union asserted, that Grievant could have known that F [REDACTED], who had been unable to go to the scene of a forfeiture on only a single

occasion prior to that time, would not be able to travel to the 22nd District on September 6, 2011. Thus, F ■■■'s testimony should be considered exculpatory. Moreover, the Union maintained, Grievant had more than sufficient cause to seize G ■■■'s money in that six of the eight potential factors identified by the Department in its Directive as support for forfeitures.

As for the alleged "white powder" the Union argued, it was the responsibility of O ■■■, the officer who allegedly discovered the powder to receipt it, not Grievant. Moreover, had there been white powder, the evidence establishes that it should have been taken directly to the Detectives. Yet, the Union continued, there is no evidence that O ■■■ ever objected to the fact that the alleged powder was not taken to the appropriate office.

Granted, the Union proffered, the traffic stop and narcotics investigation by Grievant and O ■■■ may not have been an absolutely "clean job." But such is the case with any job of this nature, the Union argued, and the City should not be permitted to go back and "pick it apart" because it wants to find fault with Grievant. The fact is, the Union asserted, considering the inconsistency of testimony and the fact that O ■■■ admits to having ■■■ prior to the PBI, one will never know the truth about what actually happened on September 6, 2011. Under such circumstances, the Union concluded, the City has failed to meet its burden of showing just cause for the dismissal of Grievant and Grievant should be reinstated with full back pay.

DISCUSSION

Just Cause

An analysis of a case claiming discharge for just cause as is presented here requires consideration of all of the circumstances presented to determine whether the discipline at issue was “fair.” There is no single formula for making such a determination and each case must be considered based upon its own unique set of facts and circumstances. Some, but not all, of the several factors often considered by arbitrators when applying the just cause standard include whether or not; (1) the employer relied on a reasonable rule for the disciplinary action, (2) there was prior notice to the employee of the rule and the consequences for violating the rule, (3) the disciplinary investigation was adequately conducted and Grievant was provided a reasonable amount of due process, (4) the employer was justified in concluding that the employee engaged in the conduct as charged, (5) the discipline issued was appropriate relative to the gravity of the offense given the employee’s disciplinary record and appropriate use of progressive discipline and (6) the discipline has been consistently applied to other employees charged with violation of the same or similar rules. It is the Employer’s burden to show that its decision to discipline satisfies the requirements of the just cause standard.

Based upon the record as a whole I find that the City has met its burden of establishing just cause for the discharge of Grievant. Of the factors considered in the just cause analysis, I find that the primary issues presented here by the Union revolve around the questions of whether the City was justified in concluding that Grievant engaged in the conduct for which he was terminated. In this regard, I find that the City has plainly met other required issues of just cause. Thus, the policies at issue here are well known and

address legitimate and important considerations relating to the Department's public mission, the City conducted a full and fair investigation of the incident at issue and provided Grievant adequate due process and that if the allegations against Grievant are shown to be true, considering their seriousness, discharge would be warranted.

The Record Establishes that the City was Justified in Concluding that Grievant had Engaged in the Conduct for Which he was Disciplined

As reflected in the relatively detailed summary of testimony presented above, the Union is correct that the testimony presented is replete with contradictions and that many of those contradictions were between the witnesses presented by the City. However, I disagree with the argument that because of such the testimony of O [REDACTED] and G [REDACTED] may not be considered by me within the context of my consideration of the testimony of other witnesses to determine the truth of what happened on September 6, 2011. The fact is, Grievant was inconsistent as well and I have based my resolution of the various conflicts presented upon my observations of the demeanor of the various witnesses and a careful consideration of the record as a whole. In this regard, although many of the details of the incident are obscured by the differing recollections of the individuals present, when one steps back and takes a look at the big picture, the determinative facts of the matter are plain.

Grievant Knew G [REDACTED] had a Reasonable Explanation for the Source of his Cash

The evidence establishes that on the evening of September 6, 2011 G [REDACTED] told anyone and everyone involved that the currency he was carrying was the result

of a lawsuit distribution and bank withdrawal that very day and showed his supporting documents to establish such to everyone he could. Considering the uncontradicted testimony of K-9 Officer S ■■■■■, who testified that while at the 22nd District G ■■■■■ told even the K-9 officer about the source of his cash and presented the related documents for his review, I am convinced that G ■■■■■ would have also made such an explanation and shown his documents to the one officer (Grievant) who was determined to take the money away from him. Whether the testimony of O ■■■■■ and G ■■■■■ are inconsistent in other areas or not, the testimony of S ■■■■■ acts to confirm the veracity of the testimony of O ■■■■■ and G ■■■■■ relating to the facts that G ■■■■■ told Grievant about the source of the currency and showed Grievant his supporting documentation. As a result, I find that beginning at the traffic stop and continuing thereafter, Grievant was aware that: (a) G ■■■■■ claimed he received the money that day as a result of a lawsuit and withdrawal from a bank; (b) G ■■■■■ had documentation to prove the truth of his story and (3) that G ■■■■■ knew Officer O ■■■■■ was of the opinion that the money was not related to any narcotics that may have been found in the automobile – an automobile neither owned nor driven by G ■■■■■ – and was not appropriately subject to lawful seizure by the police.

Based upon the record and the above described considerations, I find that the City has met its burden of establishing that Grievant engaged in conduct unbecoming (abuse of authority) as he did “not have the requisite legal reason (reasonable suspicion or probable cause) for confiscating Mr. G ■■■■■’s money and transporting them to the district for further investigation.” Additionally, considering the evidence on the issue and

Grievant's proffered explanation for his failure to contact a supervisor, an explanation I find to be weak and decline to credit, I find that the City has also met its burden of showing that Grievant violated Department policy (disobedience) by failing to notify his supervisor at any time during his investigation of G■■■■'s money.

The White Powder and Scale, and Alleged Lying During the Department's Investigation

I find that the City has also met its burden of presenting sufficient evidence to establish that it was justified in concluding that Grievant had failed to properly confiscate and receipt a scale and bag of white powder recovered during the September 6, 2011 vehicle stop, and that Grievant was not truthful when he claimed during the investigation that he knew nothing about a bag of white powder. In making this determination as to the white powder, (and again recognizing the many conflicts in testimony of the various witnesses) I primarily rely upon the fact that G■■■■ and Officer O■■■ both claimed that there was a bag of white powder taken from H■■■■'s automobile and taken downstairs at the District by Grievant. It is beyond any reasonable possibility of happenstance that two witnesses of such divergent interests as G■■■■ and O■■■ would independently manufacture the same false story about a bag of white powder taken from H■■■■'s car. Not only is it highly improbable that two individuals would separately create such a story, there is nothing in the record that would cause one to believe that it was in the interest of either witness to manufacture such a story. Based upon such considerations, I find that the record establishes (a) that a bag of white powder was removed from

H[REDACTED]'s automobile by the officers and (b) that Grievant took possession and control of the bag and took the bag downstairs to the District NETs room on September 6, 2011.

Similarly, and notwithstanding contrary testimony by G[REDACTED], the record establishes that an electronic scale was also recovered from H[REDACTED]'s automobile. Grievant admitted to seeing such a scale in the back seat of the automobile. However, I do not credit Grievant's proffered reasons for allegedly leaving the scale in the automobile. In this regard, the scale was referenced by Grievant repeatedly as paraphernalia to support his seizure of G[REDACTED]'s money and, importantly, it just does not pass the test of common sense that an officer trained in narcotics interdiction would decide not to confiscate and test an electronic scale found within close proximity of a bag of white powder discovered during a narcotics investigation. Additionally, and again, I find that there is no reason for O[REDACTED] to lie about the fact that Grievant had the scale in his hands when he went downstairs at the District. Considering such and the fact that Officer S[REDACTED] also testified that at the time he went to the District on September 6, 2011 he was told about a scale, I find that the evidence presented by the City is sufficient to establish that Grievant took possession and control of the scale.

There is no dispute that no receipt was completed for either the bag of white powder or scale. Consequently, I find that the City has met its burden of establishing that Grievant was disobedient when he failed to comply with Departmental policy relating to the handling of evidence.

Finally, as to the allegation that Grievant lied during the Department's investigation of the September 6, 2011 incident, I find that the City has met its burden of establishing that Grievant was not truthful during the investigation. Specifically, having found that the bag of white powder was removed from H[REDACTED]'s vehicle and that Grievant took control of the bag upon arriving at the 22nd District, I find that his statement that he did not know anything about any bag of white powder was not truthful.

Conclusions

The City has met its burden of showing just cause for the dismissal of Grievant.

AWARD

The grievance is denied.



Dated: August 28, 2014

Timothy J. Brown, Esquire
Arbitrator